Supreme Court, U.S.
FILED
MAY 13 1994
OFFICE OF THE CLERK

No. 93-1537

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993.

ROBERT D. KEHS, KENNETH LEBON, AND STEVEN C. BILLINGS,

Petitioners,

v.

LARRY EUGENE FOSTER, ROBERT STEWART BLOEMER, JAMES CAMPBELL, NORTHWEST AIRLINES, INC., and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. ALPA'S COUNTERSTATEMENT OF THE CASE IS INCOMPLETE

The Brief in Opposition begins by accusing petitioners of "misstatements regarding the factual background and the lower court proceedings in this case" (Opp., at 1) but ***nowhere points to a single misstatement***. Instead, it is ALPA's counterstatement of the case which is incomplete and even misleading, as the following examples illustrate:

ALPA asserts that Mr. Roberts' ruling that his awards were timely "relied on his power to interpret the Dispute Resolution Agreement, which the parties expressly granted him in Section X of the Agreement" (Opp., at 3). ALPA fails to mention, however, that, when Mr. Roberts asserted jurisdiction over the timeliness issue (JA 230-231), ***the very existence of Section X as part of the Agreement was itself in dispute***. Indeed, in claiming jurisdiction Mr. Roberts ***acknowledged*** that the "authenticity of what has been identified as Page 17 of the April 26, 1990 Letter of Agreement" (the supposed Section X) was disputed. (JA 49.)[1] Petitioners' complaint challenged Mr. Roberts' assertions of authority to decide the Section X and timeliness issues.

ALPA's Brief reads as if there had been ample opportunity for discovery prior to the motion to dismiss or for summary judgment. (Opp., at 4). To the contrary, the motion was filed four days after the responses to petitioners' initial discovery requests, and ten days after the Republic Representatives represented to the court that discovery would continue for months, before any documents were received or follow-up undertaken, and before petitioners took any

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[1] Moreover, ALPA ***nowhere mentions the provision of the Agreement which is most central to this case***, namely, that the arbitrator "shall" issue an award within 10 days, and that all "other" procedures are for the arbitrator to decide "in consultation with the parties." (Pet., at 3, 23-25.)

depositions. Petitioners certainly were not dilatory. (Pet., at 5.)[2]

According to ALPA, counsel's letter to the trial court simply advised the court that petitioners "assumed that the motion ... would be treated as one for summary judgment," and that petitioners "intended to file a motion for continuance under Rule 56(f)." (Opp., at 4.) ALPA ignores the facts that counsel ***also*** asked for notice if the motion would be treated as one to dismiss (JA 882), and that ***the trial court failed to respond to this reasonable request in any way***.

ALPA's oversimplistic description of the trial court's ruling on the Republic Representatives' motion (Opp., at 4-5), fails to recognize that the numerous issues raised by the motion were disposed of in a hodge-podge of dismissal ***and*** summary judgment, a disposition not sought by respondents and one which Rule 12(b) clearly prohibits.

ALPA's assertion that the trial court "denied" petitioner's Rule 59(e) motion to alter or amend the judgment and reaffirmed its "ruling on the motion for summary judgment" (Opp., at 5) is simply wrong. By its terms, the decision ***granted*** the Rule 59(e) motion in part and denied it in part. (A-15.) Indeed, the trial court conceded its "error of law" in treating any portion of the motion as one to dismiss where extraneous material had not been excluded. (A-9.) Nonetheless, the trial court repeated its error by granting the same patchwork relief of dismissal ***and*** summary judgment. (A-16.)

In short, ALPA, like the court below, closes its eyes to the extraordinary procedural events in the trial court: ***the Republic Representatives' motion was filed when discovery had barely begun; the Republic Representatives did not identify any of the***

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[2] ALPA's assertion that "attorneys for both pre-merger pilot groups" conducted two depositions (Opp., at 4) is misleading. The depositions were noticed ***by the Republic Representatives only***, not by petitioners.

facts assumed to be true or asserted to be undisputed; petitioners invoked their express right to request a continuance under Rule 56(f); and the trial court simultaneously denied that request and granted the motion in both of its alternative aspects, after reading from a prepared decision, without affording petitioners any meaningful opportunity to respond.

The Court is respectfully urged to re-read petitioners' complete and accurate Statement of the Case. (Pet., at 2-7.)

II. ALPA'S OPPOSITION IGNORES THE PROVISIONS OF THE FEDERAL RULES AND THE SIGNIFICANCE OF THIS COURT'S DECISIONS IN MATSUSHITA, ANDERSON AND CELOTEX

The Eighth Circuit's decision raises important issues under the Federal Rules of Civil Procedure in the wake of Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, 477 U.S. 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), which increased the quantum of evidence with which a party must respond to a summary judgment motion, and which therefore made the procedural protections of the Rules more important in assuring fairness to a non-moving party. (Pet., at 9-19.) ***ALPA seems oblivious to the undeniable impact those decisions have had on summary judgment practice***; except for a single quotation from Anderson (Opp., at 7, 8) and a passing citation to Celotex (id., at 9), ALPA's Brief reads ***as if those cases had never been decided.***

ALPA even ignores ***one of the specific procedural protections of Rule 56 implicated in this case*** -- the requirement, ***expressly stated in Celotex***, that the moving party identify the material facts asserted to be undisputed. Celotex, 477 U.S. at 323. This requirement was overlooked by the moving party, the trial court, and the Eighth Circuit. (Pet., at 15-16.) ALPA makes no effort to

explain why the Court should not address this conflict with its own decisions. In addition, as set forth below, even as to the procedural issues which ALPA addresses, it fails to acknowledge the impact of Celotex, Anderson, and Matsushita.

A. A Narrow and Technical Interpretation of Rule 56(f) is Contrary to this Court's Pronouncements

ALPA labels as "absurd" petitioners' argument that summary judgment may be granted only after a "full opportunity for discovery." (Opp., at 8.) Petitioners' argument is hardly "absurd," since ***it is based on this Court's own words in Anderson and Celotex***. (See Pet., at 12-15.) ALPA pays little heed to those decisions, and thereby misstates (as did the courts below) the standard for granting relief under Rule 56(f). ALPA asserts that a continuance may be granted only if the non-moving party identifies "information largely or exclusively under the control of the party moving for summary judgment that would establish the existence of issues of genuinely disputed material fact." (Opp., at 7.) If that ever were the sole basis for relief under Rule 56(f),[3] it cannot be so in the wake of Celotex: "Any potential problem with ... premature motions can be adequately dealt with under Rule 56(f)," under which relief is available "if the nonmoving party has not had an opportunity to make full discovery." 477 U.S. at 326.

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[3] ALPA's authority for this assertion is 10A Wright & Miller, Federal Practice & Procedure § 2740 (1982)(cited by ALPA as volume 8). Aside from the fact that the Section was written before Celotex, ***it says no such thing***. Instead, the authors emphasized the ***liberality*** of Rule 56(f): "The purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective. Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision, and that it should be applied with a spirit of liberality." Id., § 2740 at 532. At any rate, the authors have since recognized the significance of Matsushita, Anderson, and Celotex. 10A Wright, Miller & Kane, Federal Practice & Procedure § 2727 (1993 Supp.).

With one exception, ***every authority cited by ALPA for its reading of Rule 56(f) dates from before 1986***. (Opp., at 7-8.) That one exception is Anderson, in which the Court stated in a footnote that the adverse party's burden "is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." 477 U.S. at 250 n.5. (Opp., at 7, 8.) That statement must be read in harmony with the Court's statements -- of which ALPA takes no note -- that the non-moving party must meet its burden "as long as [it] has had a full opportunity to conduct discovery," Anderson, 477 U.S. at 257, and that Rule 56(f) provides relief "if the nonmoving party has not had an opportunity to make full discovery." Celotex, 477 U.S. at 326. Only after a "full" opportunity for discovery can the non-moving party reasonably be compelled to identify specific, essential information exclusively in the control of the moving party. This is clear from the Anderson footnote, which ***expressly assumed*** that "both parties have had ample opportunity for discovery." Anderson, 477 U.S. at 250 n.5.

Thus, it is a *non sequitur* to assert that petitioners seek relief from their "obligations to meet the standards of Rule 56(f)." (Opp., at 8.) Petitioners met those obligations by filing a timely request for a continuance supported by a detailed affidavit. ***The Petition asks that this Court clarify that Rule 56(f) must be applied in accordance with Matsushita, Anderson, and Celotex***.

In endorsing the trial court's simultaneous rulings on the Rule 56(f) request and the underlying motion, ALPA distinguishes Yashon v. Gregory, 737 F.2d 547 (6th Cir. 1984)(Pet., at 15), on the grounds that petitioners "were, in fact, on notice of the possibility of summary judgment ..." (Opp., at 9.) To the contrary, the Yashon plaintiff was also on notice that summary judgment was a "possibility." That case had been remanded for further action by the trial court; although the plaintiff was "justifiably unsure about

the procedural posture of the case," 737 F.2d at 552, it is obvious from his conditional Rule 56(f) request that he recognized that summary judgment was a "possibility." The situation of petitioners in the trial court was identical.[4]

B. The Express Provisions of Rule 12(b) Require a Trial Court to Make an Election Between a Motion for Summary Judgment and a Motion to Dismiss; the Parties are Therefore Entitled to Notice of the Court's Election

The Petition argued (at 17-19) that, faced with an alternative motion to dismiss or for summary judgment supported by extraneous factual matter, a trial court must give notice of its treatment of that matter. ALPA ignores the first half of this argument, namely, that to treat the motion as one to dismiss the court must give notice that it is excluding the extraneous material. (Pet., at 17-18.) ***That conclusion is dictated by the express language of Rule 12(b)***, Carter v. Stanton, 405 U.S. 669, 671 (1972), and the trial court erred by treating any portion of the alternative motion as one to dismiss without first excluding the material.

As for the second half of petitioners' argument, namely, that at least one Circuit has held that a trial court must similarly give notice if it intends to ***consider*** extraneous material (Pet., at 18), ALPA erroneously asserts that petitioners' argument "implies that they presumed or were somehow misled into thinking that the court

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[4] Significantly, the Sixth Circuit went on to state: "***Even if it were held that the plaintiff received unequivocal notice of the district court's intention to grant summary judgment*** ... [w]e hold that the plaintiff was entitled to a ruling on this properly tendered objection before the court disposed of the entire case." 737 F.2d at 552 (emphasis added). Accordingly, the Eighth Circuit's approval of the trial court's simultaneous ruling is flatly in conflict with Yashon.

would *not* treat the Defendants' motion as one for summary judgment." (Opp., at 11.) Petitioners did state that they "could not have predicted" the District Court's ultimate treatment of the motion. (Pet., at 19 n.12.) Indeed, the Rule 56(f) Request makes clear that, as in Yashon, petitioners were "justifiably unsure about the procedural posture of the case," but they recognized that summary judgment was a possibility. 737 F.2d at 552.[5]

III. WHETHER OR NOT AN ARBITRATOR'S AWARD IS RENDERED WITHIN THE TIME LIMIT SET OUT IN THE ARBITRATION AGREEMENT IS A QUESTION OF THE ARBITRATOR'S AUTHORITY AND IS FOR THE COURTS TO DECIDE

ALPA claims that the Eighth Circuit's holding -- that the timeliness issue was "a procedural one" -- "was an application of the established federal law on this subject." (Opp., at 11.) This assertion muddles the issue. The issue is not the assignment of ***all*** "timeliness" issues to the court or to the arbitrator; rather, the issue is the timeliness ***of the arbitrator's award under a contractual time limit***. ALPA's assertion reflects its confusion over the nature of "procedural arbitrability" issues under John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

To ALPA, all issues of timeliness are "procedural questions which grow out of the dispute and bear on its final disposition." (Opp., at 11, quoting John Wiley & Sons, 376 U.S. at 557.) This Court's statement of the issue at the outset of John Wiley & Sons is much more precise: "whether the courts or the arbitrator is the appropriate body to decide whether ***procedural prerequisites which***

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[5] The one authority cited by ALPA, Washington v. Allstate Ins. Co., 901 F.2d 1281 (5th Cir. 1990)(Opp., at 10), flatly conflicts with Jones v. Automobile Ins. Co., 917 F.2d 1528 (11th Cir. 1990)(Pet., at 18). This conflict simply underscores the validity of the Petition.

... ***condition the duty to arbitrate*** have been met." Id., at 544 (emphasis added). Thus, a "procedural arbitrability" issue is one which relates to a "procedural ***prerequisite***" which "conditions the duty to arbitrate" -- by definition a procedure ***prior to arbitration***. The timeliness of ***the underlying grievance*** -- the question at issue in John Wiley & Sons, and in Automotive, Petroleum & Allied Industries Employees Union, Local No. 618 v. Town & Country Ford, Inc., 709 F.2d 509 (8th Cir. 1983)(Opp., at 11)[6] -- is such an issue. The timeliness of ***the arbitrator's award*** necessarily arises ***after*** any "prerequisites" to arbitration have been fulfilled and ***cannot be*** a question of "procedural arbitrability." Rather, it is a question of ***whether the arbitrator acted within his authority***.

This is underscored by the reason for reserving substantive arbitrability issues to the courts -- to deny the arbitrator the "power to determine his own jurisdiction." AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 651 (1986). (See Pet., at 22-23.) Were an arbitrator permitted to determine the timeliness of his own award in the face of a contractual limitation, he could easily

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[6] The other Court of Appeals decision relied on by ALPA, McKesson Corp. v. Local 150, IBT, 969 F.2d 831 (9th Cir. 1992), is the ***only*** other case holding that the timeliness of an award is generally a procedural issue for the arbitrator. (Pet., at 22.) The cases cited in McKesson for the proposition that "[c]ourts have uniformly held that limitations on the time in which an arbitrator may render an award are procedural not jurisdictional," 969 F.2d at 834, say no such thing. W. Rock Lodge No. 2120, IAM v. Geometric Tool Co., 406 F.2d 284, 286 (2d Cir. 1968)(timeliness of arbitration award "should always be within ***the court's*** discretion")(emphasis added); Gunn v. Veterans Admin.Medical Center, 892 F.2d 1036 (Fed.Cir. 1990) (***pre-arbitration*** procedure); In re Arbitration No. AAA13-161-0511-85, 867 F.2d 130 (2d Cir. 1989) (agreement expressly gave the arbitrator the authority to determine timeliness of awards); Hill v. Norfolk & W.Ry.Co., 814 F.2d 1192, 1199 (7th Cir. 1987)(party has "right to challenge the timeliness" of a late award). Moreover, in McKesson, it was ***the trial court***, not the arbitrator, which decided the timeliness issue. McKesson Corp. v. Chauffeurs, Teamsters & Helpers Local Union No. 150, 795 F.Supp. 338, 343 (E.D.Cal. 1991).

frustrate any mutually-agreed time limit on his authority. For this reason, the treatment of the issue below and in McKesson conflicts with every other federal court that has considered the timeliness of an arbitrator's award.[7]

Mr. Roberts' determination that his earlier awards were timely is relied on by ALPA as the "exclusive and final" resolution of the timeliness issue (Opp., at 3).[8] Mr. Roberts purported to conduct a final-and-binding review ***of the propriety of his own actions*** -- a subject on which he had already ruled in his December 6, 1991 letter to the parties and in Supplemental Awards Nos. 8 and 9. (Pet., at 4.) Moreover, as noted above, Mr. Roberts' supposed authority to do so was in dispute. Thus, not only did Mr. Roberts assert authority to review the timeliness of his own awards, he actually asserted authority ***to determine the existence of the very provision on which he would rely to conduct that review***.[9] The blithe assertion that this was a mere "procedural" ruling, in the face

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[7] ALPA finds "puzzling" the reliance by petitioners on cases (Pet., at 21-22 n.13) which treated the timeliness of an award as a question of the arbitrator's substantive authority. (Opp., at 12.) What truly is "puzzling" is ***how the court in any of those cases could have considered the "reasonableness" of the arbitrator's conduct if it were simply a "procedural" matter for the arbitrator***.

[8] ALPA's assertion that the parties "expected that such arbitrable decisions would be final and binding, and not subject to years of federal court litigation" (Opp., at 13) appears to imply that the parties ***forswore any opportunity for judicial review of an arbitrator's actions***. That is nonsense, since nothing in the Agreement in any way exempts an arbitrator's award from the same judicial scrutiny as any labor arbitration award.

[9] Even were Section X part of the Agreement, Mr. Roberts' authority would have been to interpret the Agreement "using the procedure outlined in Section ... VII" (JA 541), which in turn contains the provision establishing the time limit for issuance of an award and reserving all "other procedures" to the arbitrator. (Pet., at 23-25.) ALPA makes no mention of this provision ***expressly exempting the timing of an award from the arbitrator's "procedural" authority***.

of the parties' contractual language and their practice of treating the time limit as mandatory (Pet., at 23-25), raises significant issues of the authority of arbitrators in federal labor arbitration proceedings -- issues which this Court should address.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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